

52. In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.¹⁴³ The Commission seeks comment on significant alternatives and recommends that small entities file comments in response to the *Further Notice*. We anticipate that the record will be developed concerning alternative ways in which the Commission could lessen the burden on classes of carrier or entities and will most likely benefit small entities more, relative to large entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

53. None.

¹⁴³ See *id.*

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

*Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services
First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295,
RM-10865)*

Responding to the needs of law enforcement is of paramount importance. New technologies present challenges to executing authorized electronic surveillance. The Order adopted today affirms that interconnected VoIP and facilities-based Internet access providers are subject to CALEA. These services have proliferated in recent years, and they continue to grow at exponential rates. Given this, it is critical to our nation's security that VoIP and broadband Internet access providers have CALEA obligations.

Although I believe that new technologies and services should operate free of economic regulation, I also believe that law enforcement agencies must have the ability to conduct lawful electronic surveillance over these new technologies. We must strike a balance between fostering competitive broadband deployment with meeting the needs of the law enforcement community.

The Order that we adopt today is an important first step, but there is still more work ahead of us. In the next few months, we intend to issue a subsequent order that will address other important issues under CALEA such as cost recovery, standards, and enforcement. Nevertheless, we firmly expect that interconnected VoIP and facilities-based broadband Internet providers use the regulatory clarity provided by this Order to begin tackling the technical issues necessary for full compliance. I am committed to ensuring that these providers take all necessary actions to incorporate surveillance capabilities into their networks in a timely fashion. To this end, the Commission intends to continue working closely with industry representatives, equipment manufacturers, and law enforcement officials to address and overcome any challenges that stand in the way of effective lawful electronic surveillance.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services,
First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295,
RM-10865)*

Of all our responsibilities, none is more important than preserving public safety. The very first sentence in the very first section of the Communications Act establishes the Commission "for the purpose," among others, "of promoting safety of life and property through the use of wire and radio communications." Last year, the Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration brought to our attention ways in which the Commission might act to further this goal by closing gaps in the application of CALEA – gaps that increase the danger posed to American citizens by criminals and terrorists. We quickly opened a proceeding to address the critical issues raised by law enforcement, and I am pleased that we have now taken an important first step in resolving them.

I am happy to support this item, which properly signals the Commission's intention to apply CALEA's requirements to providers of broadband Internet access and VoIP, but wisely seeks further input regarding the precise form that those obligations will take and grants providers sufficient time to reconfigure their systems. In particular, issues regarding enforcement and cost recovery warrant further investigation now that we have resolved broader questions regarding the statute's coverage, and we will benefit from a more nuanced record on these matters.

Our decision today must not, however, lead to complacency regarding the need for legislative action clarifying CALEA's reach. Because litigation is as inevitable as death and taxes, and because some might not read the statute to permit the extension of CALEA to the broadband Internet access and VoIP services at issue here, I have stated my concern that an approach like the one we adopt today is not without legal risk.

Upon review of the record compiled and of CALEA's legislative history, I believe that the construction we adopt is reasonable, particularly given law enforcement's indisputably compelling needs. In circumstances like these, as the Supreme Court recently emphasized in its *NCTA v. Brand X* decision, the Commission's interpretation is due deference from the courts. Nevertheless, because some parties will dispute our conclusions, the application of CALEA to these new services could be stymied for years. For this reason, I continue to believe that the Commission, the law enforcement community, and the public would benefit greatly from additional Congressional guidance in this area.

In sum, I am happy to support this item, which is of the utmost importance to public safety in the twenty-first century. I believe we have interpreted the statute faithfully, and expect that courts will ultimately agree. But I think it is wise to follow the lead of good law enforcement officers everywhere, and to call for backup *before* a potential problem becomes an actual hazard. To that end, I repeat my plea for Congressional clarity and for the certainty such clarity will bring.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services,
First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295,
RM-10865)*

The first duty of a public servant is to advance public safety. CALEA is a critical part of our public safety responsibilities. By ensuring that law enforcement has access to the resources CALEA authorizes, we support efforts to combat crime and promote homeland security.

Though I approve today's decision, I continue to note that it is built on very complicated legal ground. The statute is undeniably stretched to recognize new service technologies and pushed very hard to accommodate new and emerging telecommunications platforms. If, however, CALEA is not judged to apply to these new services, our efforts here will have done more harm than good. I am hopeful that is not the case.

Thank you to the Bureau for its work on this item.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN FCC 05-150, APPROVING IN FCC 05-153**

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers (CC Docket No. 02-33), Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01-337), Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements (CC Docket Nos. 95-20, 98-10), Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises (WC Docket No. 04-242), Consumer Protection in the Broadband Era (WC Docket No. 05-271) (Concurring)

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865) (Approving)

The items before us are a real tribute to the consensus building dedication of Chairman Kevin Martin and all of my colleagues. It took extraordinary efforts by all of us because the stakes are so high, the consequences so far reaching, and the concerns so acute. And we did all of this work in an incredibly compressed time-frame.

Today, we implement the Supreme Court's guidance in the *Brand X* decision and embark on a new but uncharted path in its treatment of wireline broadband Internet access services, the high-speed DSL and fiber-to-the-home connections. These technologies are revolutionizing the way that consumers connect, learn, work, and socialize through the Internet. With the Broadband Reclassification Order and NPRM, we move toward a measured and technology-neutral approach to broadband regulation. Critical aspects of the reclassification approach, however, give me considerable pause.

Indeed, were the pen solely in my hand, these are not the precise items I would have drafted or the procedural framework I would have chosen. In the wake of the Supreme Court decision, however, this reclassification was inevitable. Moreover, the Broadband Reclassification Order reflects meaningful compromise by each of my colleagues, and I appreciate the efforts to address many of my concerns about issues including the stability of the universal service fund, access for persons with disabilities, and the ability of competitive carriers to access essential input facilities. What we've done here is ensure it was done in a fashion that protects, or holds the promise of addressing, many critical policy goals that Congress and the Commission have long held as fundamental to a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."

As we move to this less-regulated framework, I'm pleased that we take up the Supreme Court's invitation to use our Title I ancillary jurisdiction to address critical policy issues. Commissioner Copps and I have worked hard to address or lay the groundwork for addressing many important consumer and public policy concerns, and I appreciate Chairman Martin and Commissioner Abernathy's willingness to engage in a constructive discussion about a technology-neutral framework for policy in the broadband age. I'm particularly pleased that recent changes to the Broadband Reclassification Order reiterate our commitment to access for persons with disabilities and consumer protection, and provide for meaningful provisions to address the needs of carriers serving Rural America. I'm also pleased that we adopt a

companion Order applying the Communications Assistance for Law Enforcement Act (CALEA) to facilities-based broadband Internet access providers and providers of interconnected VoIP services. Finally, we adopt concurrently a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. Collectively, these provisions are essential for my support of this item.

We undertake these proceedings against the backdrop of the *Brand X* decision, in which the Supreme Court upheld the FCC's earlier determination that cable modem broadband services may be classified as information services, rather than as traditional telecommunications services. By doing so, the FCC defined these cable broadband services out of Title II of the Act, which applies to common carrier offerings. I was not at the Commission when this reclassification approach was first proposed, but the approach has always given me some grounds for real concern. By reclassifying broadband services outside of the existing Title II framework, the Commission steps away from some of the core legal protections and grounding afforded by Congress. This approach also gave a significant and articulate minority of the Supreme Court grounds for questioning whether the Commission had fundamentally misinterpreted the Communications Act. But, my reservations notwithstanding, the Supreme Court majority upheld the reclassification and we must respond to this changed landscape.

In fact, there is much to be said for a measured regulatory approach for broadband services. The applications that can ride over broadband services are bringing increased educational, economic, health, and social opportunities for consumers. I'm increasingly convinced that our global economic success will also be shaped by our commitment to ubiquitous advanced communications networks. Our challenge is to create an environment in which providers can invest in their networks and compete, application and content providers can innovate and reach consumers, and we can all maintain the core policy goals that we've worked hard to achieve.

The Broadband Reclassification Order acknowledges that the marketplace and technology of today's broadband Internet access services are markedly different from those that existed three decades ago, when most of the *Computer Inquiries*' requirements were first adopted. Although we adopt this new regulatory approach with the blessing of the Supreme Court, many of the implications for consumers are largely yet undefined. To some degree, we ask consumers to take a leap of faith based on our predictive judgment about the development of competition in an emerging and very fluid broadband marketplace.

It remains unclear whether the approach we have taken thus far has been a success. Not all consumers have a choice between affordable broadband providers, and Americans continue to pay relatively high prices for relatively limited bandwidth. As we move forward, I am pleased that the Commission adopts a one-year transition for independent ISPs and encourages parties to engage in prompt negotiations to facilitate the transition process. While this is helpful, we have a lot more work to do to establish a coherent national broadband policy that signifies the level of commitment we need as a nation to speed the deployment of affordable broadband services to all Americans. So we will have to monitor closely the development of the broadband market and the effectiveness of this approach. If results don't improve, I hope we will reconsider what measures are needed to spur the level of competition necessary to lower prices and improve services for consumers.

A critical aspect of our decision to eliminate existing access requirement for ISPs is the Commission's adoption of a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. These principles are designed to ensure that consumers will always enjoy the full benefits of the Internet. I am also pleased that these principles, which will inform the Commission's future broadband and Internet-related policymaking, will apply across the

range of broadband technologies. I commend in particular my colleague, Commissioner Copps, for his attention to this issue.

I am also pleased that changes were made to the Broadband Reclassification Order that affirm our authority under Title I to ensure access for those with disabilities. Through sections 225 and 255 of the Act, Congress codified important principles that have ensured access to functionally-equivalent services for persons with disabilities. Millions of Americans with disabilities can benefit from widely-available and accessible broadband services. Indeed, at last month's open meeting, the Commission recognized the importance of broadband services to persons with disabilities, and celebrated the 15th anniversary of the Americans with Disabilities Act (ADA), by adopting a series of orders that improved the quality of and access to important communications services for the deaf and hard of hearing community. I strongly believe that we must not relegate the ADA's important protections to the world of narrowband telephone service, and I appreciate my colleagues' willingness to address this concern.

I'm also particularly pleased that the Broadband Reclassification Order includes meaningful provisions to address the needs of carriers serving Rural America. By allowing rural providers to continue to offer their broadband services on a common carrier basis, and by allowing them to participate in the NECA pooling process, we maintain their ability to reduce administrative costs, minimize risk, and create incentives for investment in broadband facilities that are so crucial to the future of Rural America.

We also take important interim action in the Broadband Reclassification Order to preserve the stability of our universal service funding. Reclassifying broadband services as information services removes revenues from wireline broadband Internet access services from the mandatory contribution requirements of section 254, taking out a rapidly-growing segment of the telecommunications sector from the required contribution base. I would have preferred to exercise our permissive contribution authority now to address this potential decline in the contribution base permanently, but I am glad that we were able to agree to adopt an interim measure to preserve existing levels of universal service funding on a transitional basis. I also appreciate the Commission's commitment to take whatever action is necessary to preserve existing funding levels, including extending the transition or expanding the contribution base. These modifications to the Broadband Reclassification Order are critical to my support of the item.

The Commission will also need to assess how the reclassification of wireline broadband services might affect our ability to support broadband services through the universal service fund, should we decide to do so in the future. Given the growing importance of broadband services for our economy, public safety, and society, I hope that we can preserve our ability to support the deployment of these services for consumers that the market may leave behind.

I'm also glad that we've added an important Notice of Proposed Rulemaking that seeks comment on how we can ensure that we continue to meet our consumer protection obligations in the Act. On some issues, like consumer privacy, it would have been far wiser to act now. I'm troubled by the prospect that we might even temporarily roll back consumer privacy obligations in the Broadband Reclassification Order, particularly during this age in which consumers' personal data is under greater attack than ever. The Commission must move immediately to address these privacy obligations. We should also act quickly to assess the effect on our Truth-in-Billing rules and the rate averaging requirements of the Act, which ensure that charges for consumers in rural areas are not higher than those for consumers in urban areas. This Notice sets the foundation for our consumer protection efforts across all broadband technology platforms and I look forward to working with my colleagues as we move forward promptly to address these issues.

For all these reasons, I concur in today's Broadband Reclassification item and support the CALEA item.

I would like to thank my colleagues for their willingness to engage in constructive dialogue and to take meaningful steps to acknowledge many of my concerns. I also want to thank Tom Navin and the dedicated and professional staff of our Wireline Competition Bureau, who have worked many long hours to produce these companion items so quickly. All of our personal staffs have worked incredibly long hours with great dedication to speed this process along. I would like to acknowledge my personal gratitude to Scott Bergmann for his incredible stamina and persistence. I would be remiss if I didn't also thank his entire family for sacrificing their sacred time with him over these past few weeks. I look forward to working with you all as we moved forward together.